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September 25, 1997

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RM-9101

Dear Mr. Caton:

On September 9, 1997, I sent the enclosed letter to Chairman Hundt, with copies to Commissioners Quello, Chong and Ness, but neglected to file a copy with your office. I am sorry for any inconvenience this may have caused.

Thank you for your cooperation in this matter.

Sincerely,


Joel I. Klein

JIK/jhb

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September 9, 1997

Chairman Reed Hundt
Federal Communications Commission
Room 814
1919 M Street, NW
Washington, DC 20554

Re: Request for Comments on Petition for Expedited Rulemaking to Establish Reporting Requirements and Performance and Technical Standards for Operations Support Systems

Dear Chairman Hundt:

The Justice Department supports the Commission's decision to proceed, on an expedited basis, to consider LCI and Comptel's Petition to Establish Reporting Requirements and Performance and Technical Standards for Operations Support Systems (OSSs). The competitive importance of nondiscriminatory access to the OSSs of incumbent local exchange carriers (ILECs) has been clearly recognized by the Department, the FCC, several State Commissions, and a wide spectrum of private parties, including the ILECs themselves.¹ As the Department has stated in its previous comments to the Commission, access to efficient OSS functionality is inseparable from the resale and network unbundling requirements of the 1996 Act and automated access to such systems plays a pivotal role in providing competitive local exchange carriers (CLECs) with resale services and unbundled elements in competitively-significant

¹See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-98 and 95-185, at ¶ 518 (rel. Aug. 8, 1996); Michigan Public Service Commission, In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Michigan, CC Docket No. 97-1, Comments, at 24-25 (Feb. 5, 1997); Letter from Antoinette Cook Bush, Counsel, Ameritech, to William Caton, Acting Secretary, Federal Communications Commission, July 10, 1996.

volumes and in a competitively-neutral manner.²

While the Department recognizes that the Commission may wish to address other issues related to OSS access, we believe that there is a critical and pressing need for the development of appropriate reporting requirements for measuring ILEC performance.³ The 1996 Act and the Commission's rules require ILECs to provide access to resale services and unbundled elements in a non-discriminatory fashion and in a manner that affords new entrants a "meaningful opportunity to compete."⁴ But, these obligations will remain "abstractions," as Ameritech has put it, unless there are "concrete, detailed performance standards and benchmarks for measuring [an ILEC's] compliance with its contractual obligations and impos[ing] penalties for noncompliance."⁵ The first step in this process must be, in the words of the Michigan PSC, "[a] specific determination of how measurements should be made."⁶ Such a determination is needed so that (1) ILECs and CLECs cannot suggest different results as to the same performance measures; and (2) an ILEC's levels of performance within a state can be compared to its performance in other states within its region, as well as with the performance of other ILECs.

Defining appropriate measures of performance will benefit ILECs, CLECs, and the regulatory agencies. Incumbents will benefit because the delineation of appropriate performance measures will help them to identify performance deficiencies and to allocate resources to correct such deficiencies. In addition, when an incumbent has provided appropriate access to its OSSs, the availability of a common language with which all interested parties are able to discuss such

² See, e.g., Application of SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Oklahoma, Evaluation of the United States Department of Justice, CC Docket No. 97-121, at Appendix A (May 16, 1997) ("DOJ Oklahoma Evaluation").

³ *Performance measures*, such as the time it takes to install a resold service, are merely descriptive of performance. By contrast, *performance standards* actually set a performance level or goal, such as the installation of a resold service within three days. Finally, a *performance benchmark* is established when a particular performance level is sustained over a significant period of time. Because performance measures are often reported pursuant to contractual or regulatory obligations, many use the terms "reporting requirements" and "performance measures" interchangeably. For simplicity purposes, this letter follows that approach.

⁴ DOJ Oklahoma Evaluation at 27 n.38.

⁵ Brief in Support of Application by Ameritech Michigan for Provision of In-Region, InterLATA Services In Michigan, CC Docket No. 97-137, at 85 (May 21, 1997).

⁶ Michigan Public Service Commission, In the Matter of the Application of Ameritech Michigan, Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, Consultation, at 32 (June 9, 1997).

performance before state commissions and the FCC will help an incumbent to demonstrate the adequacy of its performance. For purposes of the Section 271 process, the Commission has already recognized the significance of precise performance measurements in its evaluation of Ameritech's Michigan application. In the Department's view, such measurements will prove useful in other regulatory contexts as well.

Performance measures are important not only to ascertain the BOC's level of performance, but also to establish a performance benchmark, or track record of performance. Once a performance benchmark is in place, such as a record of having successfully switched a certain number of resale customers per week, an incumbent will be unable to claim that it lacks the ability to achieve such results in the future. As elaborated in the affidavit of Marius Schwartz, the Department's economic expert on Section 271 applications, one of the most significant areas in which incumbent providers may be presented with an opportunity to stall competitive entry is in the development of wholesale support processes.⁷ Once such arrangements are demonstrably in place, however, regulators and competitors will be better equipped to ensure that BOCs do not "backslide" from an established level of performance.⁸

Some commenters have suggested that because the states and the affected companies are able to design performance measures through negotiation, arbitration, or state PUC rulemakings, the Commission need not do so.⁹ We disagree. If the relevant performance *measures* vary from state to state, even for the same ILEC in a single region, it will be far more difficult for state regulators, competitors, the Department, and the Commission to compare ILEC performance across states or regions. Such comparisons will be of substantial value, whether performance *standards* are nationally uniform, vary from state to state, or vary among ILECs within a state.

The obvious starting place for measuring an ILEC's performance, in the Department's view, would be to make clear that retail and wholesale performance must be measured

⁷ See Affidavit of Dr. Marius Schwartz ("Schwartz Aff."), Tab C to the DOJ Oklahoma Evaluation.

⁸ See Schwartz Aff. ¶70 ("Absent meaningful benchmarks, penalty threats are problematic, because regulators and courts lack the information about what are reasonable implementation lags for new systems."); *Id.* ¶77 (Once "a track record is created for what constitutes 'good performance[,] [p]ost-entry safeguards -- regulatory, antitrust and contractual -- then become more effective at countering BOC attempts to reduce cooperation, since the performance benchmarks can help enforcers prevent future backsliding and extend these arrangements to other regions or other entrants.").

⁹ See, e.g., Comments of BellSouth Corporation in Petition for Expedited Rulemaking of LCI International Telecommunications Corporation and Competitive Telecommunications Association to Establish Technical Standards for Operations Support Systems, FCC RM-9101, at 3 (July 10, 1997).

identically wherever the two activities are performed analogously.¹⁰ Under this approach, for example, an ILEC would report on the response time to repair and maintenance requests from its own customers as well as those from a CLEC using the ILEC's wholesale support systems. While in many cases the relevant retail performance measures are either already being reported and/or required by the state PUCs, this proposed rulemaking affords the Commission the opportunity to promulgate a list of retail and analogous wholesale measures that will enable an ILEC to establish that it is providing resale services and unbundled elements under nondiscriminatory conditions.

Where there is no analogous retail activity from which to determine performance parity, such as with the provisioning of many unbundled elements, the Department's Section 271 standard, like the Commission's rules,¹¹ calls for the institution of an appropriate performance measure to determine the "adequacy" of the Bell Operating Company's wholesale performance.¹² At present, ILECs, CLECs, states, and the Department are all attempting to ascertain which performance areas must be measured as well as the appropriate approach for measuring performance in those areas. For example, the measurement of performance in the provisioning of unbundled loops posed a concern for the Department in our evaluation of Ameritech's application for Section 271 authority in Michigan, as Ameritech only measured the number of due dates met, rather than the ability to provision loops within a particular, perhaps competitively-significant, standard interval.¹³

In short, the development of an appropriate set of reporting requirements will allow for an assessment of both whether an ILEC has (1) attained the necessary level of performance (to be adequate); as well as (2) established a basic performance benchmark. At this time, however,

¹⁰ See Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, Memorandum Opinion and Order, CC Docket No. 97-137, at ¶¶ 141, 142, 139 (rel. Aug. 19, 1997) ("[T]he Commission determined in the *Local Competition Order* that, for the provisioning of unbundled local switching that only involves software changes, customers should be changed over in the same interval as LECs currently change over end users between interexchange carriers." The Commission also stated that "a number of the OSS functions provided to competing carriers have an analogue associated with a BOC's retail operations and, therefore, equivalent access, as measured by those analogues, would be the standard of performance required by section 271 for those OSS functions.") (footnotes omitted).

¹¹ The Commission's rules require ILEC's to provide an efficient competitor with a "meaningful opportunity to compete." See supra note 4.

¹² Affidavit of Michael J. Friduss ¶ 29, Tab D to the DOJ Oklahoma Evaluation.

¹³ Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Michigan, Evaluation of the United States Department of Justice, CC Docket No. 97-137, at A-27 (June 25, 1997).

there is no clear and comprehensive guidance as to which reporting requirements will best serve these twin purposes. To rectify this situation, the Department recommends that the Commission determine both what categories of performance should be measured (and reported) to determine adequacy as well as how they should be measured.

To the extent that the Commission decides to address issues in addition to codifying national performance measures, the Department recommends that the Commission prioritize its tasks, first endeavoring to decide on appropriate performance measures as expeditiously as possible. The Commission may ultimately decide to set performance or technical standards, but these projects should not delay the critical task of setting out national guidelines for the measurement of an ILEC's performance. In many instances, parity will serve as a performance standard once proper measurements are established, and industry bodies, such as the Alliance for Telecommunications Industry Solutions, have made significant progress in establishing technical standards. Thus, by concentrating on questions of performance measurement first, the Commission may find that the effort needed in other areas may be more limited or unnecessary.

By identifying the appropriate performance measures with alacrity -- both to determine the parity and adequacy of an ILEC's wholesale performance -- the Commission will contribute considerably to the nationwide effort to facilitate local entry. In the Department's view, uncertainty as to the appropriate performance measures complicates not only the Section 271 process, but also other regulatory oversight efforts. We hope you find our input helpful and are ready to assist you as you move forward in this effort.

Sincerely,


Joel I. Klein

cc: Commissioner James Quello
Commissioner Rachelle Chong
Commissioner Susan Ness